



## Australian Government

### Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT  
BARTON

FOI

FOI/2016/056

#### *FREEDOM OF INFORMATION ACT 1982*

**REQUEST BY:** Ms Kat Szuminska

**DECISION BY:** Ms Helen Owens  
Assistant Secretary  
Public Data Branch

#### **FOI request**

In an email dated 14 March 2016 the applicant made a request to the Department of the Prime Minister and Cabinet under the *Freedom of Information Act 1982* (the FOI Act) seeking access to the following documents:

*the Draft OGP National Action Plan document referred to in the following tender:  
Contract Notice View - CN2647591 [https://www.tenders.gov.au/?  
event=public.cn.view&CNUUID=89D90E35-F400-B178-216225EEB4078193](https://www.tenders.gov.au/?event=public.cn.view&CNUUID=89D90E35-F400-B178-216225EEB4078193)*

#### **Authorised decision-maker**

I am authorised to make this decision in accordance with arrangements approved by the department's Secretary under section 23 of the FOI Act.

#### **Searches**

I arranged for searches of the Department's electronic and other records to be undertaken and made inquiries with officers who had knowledge of the subject matter and would be likely to be able to locate documents within the scope of the request.

As a result of these searches I have identified 1 document that falls within the scope of the request.

#### **Decision**

I have decided to refuse access to document 1 in accordance with section 47C (public interest conditional exemptions – deliberative processes) as access would be contrary to the public interest.

My reasons for the decision appear below.

## **Reasons for decision**

### ***Section 47C – Deliberative processes conditional exemption***

Section 47C of the FOI Act provides that documents are conditionally exempt from disclosure if their disclosure would disclose *deliberative matter* in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or a minister.

Section 47C(2) provides that *deliberative matter* does not include purely factual material. However, as the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines) explain at paragraph 6.73, where factual and deliberative material are so intertwined that it is not possible to separate them, both elements may be deliberative.

*Deliberative matter* for the purpose of the conditional exemption in section 47C is not confined to matter in the nature of advice, opinion or recommendation but includes matter relating to opinion or advice, or consultation or deliberation that has been prepared or that has taken place in the course of, or for the purpose of, deliberative processes associated with the functions of an agency or a minister.

The Guidelines note (at paragraph 6.69) that where material was gathered as a basis for intended deliberations, it may be deliberative matter.

Document 1 is a working draft of a possible Open Government Partnership National Action Plan. It comprises advice and opinion about what might be contained in such a plan and was developed as a basis for consultation and deliberation on the issue of whether Australia should join the Open Government Partnership. It was commissioned to support provision by responsible Commonwealth agencies of policy advice to government.

Document 1 is a working draft that contains comments and suggested changes because it served as a vehicle for exchange of opinions and advice on matters related to membership of the Open Government Partnership. It draws together material for intended deliberations by responsible agencies and ministers about policy and practical issues related to possible membership of the Open Government Partnership.

I am satisfied that document 1 is conditionally exempt, in its entirety, from disclosure under section 47C of the FOI Act because its disclosure would disclose deliberative matter prepared for the purposes of deliberative processes involved in the functions of this and other departments. Taking into account the content of document 1 and the purpose for which it was created, I am satisfied that any factual material in it is unable to be separated from deliberative material in order to allow disclosure of the purely factual material. I am also satisfied that any factual material in the document was gathered solely as the basis for intended deliberation.

Under the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest. My weighing of public interest factors follows.

Section 11B of the FOI Act lists the public interest factors favouring access. Of these factors, I consider that two are relevant to this request:

- promoting the objects of the FOI Act; and
- informing debate on a matter of public importance.

The FOI Act does not list any specific factors weighing against disclosure, however, I have identified the following factor as relevant:

- disclosure could reasonably be expected to impair the department's ability to provide frank, comprehensive advice, opinions and recommendations on issues associated with entering into international agreements.

While disclosure of document 1 would provide additional information about the deliberative processes associated with policy development in relation to Australia's membership of the Open Government Partnership, it would at the same time substantially undermine the ability of agencies to consult and deliberate freely on similar matters in the future. Since Australia is now seeking membership of the Open Government Partnership and public consultation on the content of Australia's National Action Plan is currently underway, I do not consider that disclosure of an early deliberative draft document would effectively inform the current debate on this matter. I note that a government forum for public discussion about the Open Government Partnership National Action Plan is available online at <https://ogpau.govspace.gov.au/>

I consider that, under the circumstances, the factors in favour of disclosure are outweighed by the factors against disclosure. As a result I am satisfied that document 1 is conditionally exempt under section 47C of the FOI Act and that disclosure of this deliberative material would be contrary to the public interest.

### **Review rights**

Information about the applicant's rights of review is attached to this decision.

### **Complaint rights**

The applicant may make a complaint to the Information Commissioner or the Commonwealth Ombudsman about the Department's actions in relation to this decision. Making a complaint about the way the Department has handled an FOI request is a separate process to seeking review of the Department's decision.

**Please note:** From 1 November 2014 the Information Commissioner will refer all FOI complaints to the Commonwealth Ombudsman.

A complaint to the Information Commissioner must be in writing and identify the agency in respect of which the complaint is made. The Office of the Australian Information Commissioner (OAIC) may be contacted by phone (1300 363 992), email ([enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)) or by letter (GPO Box 5218 Sydney NSW 2001). Further information about the OAIC can be found on their website: <https://www.oaic.gov.au/>

A complaint to the Commonwealth Ombudsman may be made orally or in writing. You may make a complaint to the Office of the Commonwealth Ombudsman by phone (1300 362 072), by letter (GPO Box 442 Canberra ACT 2601), by fax (02 6276 0123), in person or through their online complaint form. Further information about the Commonwealth Ombudsman can be found on their website: <http://www.ombudsman.gov.au/>.

If the applicant has any queries in relation to the decision she may contact the Department by email at [FOI@pmc.gov.au](mailto:FOI@pmc.gov.au) or by telephone on (02) 6271 5849.



Helen Owens  
Assistant Secretary  
Public Data Branch

6 June 2016



## Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

### Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

### Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

#### Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

#### Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


#### Do I have to pay?

No. The Information Commissioner's review is free.

#### How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

**online:** [www.oaic.gov.au](http://www.oaic.gov.au)  
**post:** GPO Box 2999, Canberra ACT 2601  
**fax:** +61 2 9284 9666  
**email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)  
**in person:** Level 8, Piccadilly Tower  
133 Castlereagh Street  
Sydney NSW



An application form is available on the website at [www.oaic.gov.au](http://www.oaic.gov.au). Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

### **Can I get help in completing the application?**

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

### **When do I have to apply?**

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

### **Who will conduct the review?**

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

### **Does the Information Commissioner have to review my matter?**

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

### **Can I withdraw my application?**

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

### **What happens in the review process?**

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

### **Will there be other parties to the review?**

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

### **Can someone else represent me?**

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

### **Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?**

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

### What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

### What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

### Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

### What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see [www.aat.gov.au/FormsAndFees/Fees.htm](http://www.aat.gov.au/FormsAndFees/Fees.htm).

### FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

#### For further information

**telephone:** 1300 363 992

**email:** [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

**write:** GPO Box 2999, Canberra ACT 2601  
or visit our website at [www.oaic.gov.au](http://www.oaic.gov.au)